

**Coventry Health Continuum d/b/a Coventry Health Center and Teamsters Local Union No. 64, a/w International Brotherhood of Teamsters, AFL-CIO.** Case 1-RC-20761

September 14, 2000

DECISION ON REVIEW AND ORDER

BY MEMBERS FOX, LIEBMAN, AND HURTGEN

On March 19, 1998, the Acting Regional Director for Region 1 issued a Decision and Direction of Election in the above-entitled proceeding, in which the Petitioner seeks to represent a unit of all registered nurses (RNs) employed by the Employer at its 344-bed nursing home. The Employer objected to the inclusion in the unit of RNs who work as charge nurses, asserting that they are supervisors within the meaning of Section 2(11) of the Act as they evaluate and discipline the Employer's certified nursing assistants (CNAs), assign and direct their work, and adjust their grievances. The Acting Regional Director found that the RN charge nurses are statutory supervisors solely on the basis of their authority to perform probationary evaluations of newly hired CNAs and their role in the annual merit raise evaluations of all CNAs.

Thereafter, in accordance with Section 102.67 of the National Labor Relations Board's Rules and Regulations, the Petitioner filed a timely request for review of the Acting Regional Director's decision, contending that he had erred in finding that the Employer's RN charge nurses are statutory supervisors. By Order dated May 8, 1998, the Board granted the Petitioner's request for review.<sup>1</sup>

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

After careful consideration of the entire record in this case, including the Employer's brief on review, the Board concludes, contrary to the Acting Regional Director, that the RN charge nurses' role in the Employer's evaluation procedure does not establish that they are supervisors within the meaning of Section 2(11) of the Act.

I. FACTS

*A. Probationary Evaluations*

As the Acting Regional Director found, the RN charge nurses evaluate the CNAs three times during their probationary period—after 30, 60, and 90 days of employment—and annually thereafter. On the probationary evaluations, each aide is given a numerical score in several categories, including: quality, productivity, job knowledge, dependability, independence, initiative, ad-

herence to policy, interpersonal relations, judgment, and attendance.<sup>2</sup> The form does not provide a space for recommendations; however, the charge nurses may add comments and/or make recommendations based on particular concerns they have regarding the aide who is being evaluated. The charge nurses also may speak directly to the director for nursing services, Carol Peltier, or to the in-service director about the aide.

Janet Cornell, the Employer's assistant director for nursing services, testified that Peltier reviews the evaluation and the scores given by the charge nurse to determine whether the aide has completed the probationary period successfully. Cornell also stated that a charge nurse's recommendation that a CNA needs further training would result in the aide's probationary period being extended, and that there would be a delay in the (unspecified) wage increase which generally is awarded at the end of a successful probation. The record, however, does not contain any examples of an aide's probationary period having been extended or indicate that any aide's employment has been terminated after the probationary period.

*B. Annual Evaluations*

In July 1997, the Employer instituted a new evaluation system under which all employees are evaluated each July, and the numerical scores received on these performance appraisals directly correlate to specific merit increases.<sup>3</sup> All aides whose employment commenced prior to July 1, 1996, were given hourly merit increases based on the following performance evaluation scores: 90–100 = 50 cents; 90–95 = 40 cents; 86–69 = 25 cents; 80–85 = 20 cents; 76–79 = 15 cents; 70–75 = 10 cents; and below 70 = no increase. Another .5 to 1.5 cents was awarded each employee, based on seniority.<sup>4</sup>

Cornell, who was an RN nursing supervisor at the time the Employer instituted its new evaluation system, testified that the evaluations first were filled out by the RN nursing supervisors (stipulated to be statutory supervisors). She stated that she then gave the evaluations to the charge nurses working with her to go over, and asked them to make any changes they saw fit and to add any comments that they "needed to." After a number of evaluations had been completed, concerns about the new

<sup>2</sup> The scores range from 1 to 100 (100–90 = excellent; 89–80 = above average; 79–70 = satisfactory; 69–60 = improvement needed; below 60 = unsatisfactory).

<sup>3</sup> Prior to that time, all employees were evaluated annually on the anniversary of their hire, and the evaluations were not tied to merit increases.

<sup>4</sup> The Emp. Exh. 12 is an (undated) memorandum describing the increases. Testimony indicated that it was given to the charge nurses before the evaluations were completed, and then apparently, sent to all employees.

<sup>1</sup> The Employer also filed a request for review which the Board denied in its May 8, 1998 Order, contending, *inter alia*, that its in-service coordinator and MDS coordinators were managerial employees.

evaluations were discussed at a meeting of department heads. As a result, according to Cornell, a new form was created,<sup>5</sup> and the nursing supervisors were told that the RN charge nurses had to be part of the process, *i.e.*, that the charge nurses needed to evaluate their aides. Cornell testified, however, that she again filled out the forms first, then gave them to the charge nurses who “made some significant changes” which she discussed with them. Pelltier then reviewed the evaluations and told the nursing supervisors to look at attendance records, as well as counseling forms and commendations in the aide’s personnel file, in order to complete the evaluations. After doing this, Cornell asked her charge nurses to review the evaluations and to make any changes they felt appropriate. The charge nurses suggested changes and discussed their suggestions with Cornell, before any scores and/or comments were adjusted or amended. According to Cornell, if the charge nurses disagreed with a certain score, the aide would receive the score that the nurse gave them as long as the charge nurse could “justify” or substantiate her comments.

Two RN charge nurses also testified regarding the annual evaluations. Sandra Meagher stated that the first time the new merit evaluations were done, her nursing supervisor filled out the forms and then called her in to discuss them. She testified that she agreed with what the nursing supervisor had written. When the evaluation forms were completed the second time, Meagher noted that she did not see the evaluations before they went to Pelltier. Alternate charge nurse Brenda Verville testified that the regular charge nurse completed the first set of evaluations which were “brought back” to be redone. At that point the nursing supervisor took over the evaluations, “involved” the regular charge nurse, then Verville and an LPN charge nurse were asked to look over each one and to initial the form if they agreed with the evaluation.

## II. ANALYSIS

Section 2(3) of the Act excludes “any individual employed as a supervisor from the definition of ‘employee.’” Section 2(11) of the Act defines ‘supervisor’ as:

any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of

such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Section 2(11) is to be read in the disjunctive, and the “possession of any one of the authorities listed in [that section] places the employee invested with this authority in the supervisory class.” *Ohio Power Co. v. NLRB*, 176 F.2d 385 (6th Cir. 1949), cert. denied 338 U.S. 899 (1949). The exercise of that authority, however, must involve the use of independent judgment. *Provident Nursing Home*, 187 F.3d 133 (1st Cir. 1999), enf. 324 NLRB No. 46 (1997); *Telemundo de Puerto Rico*, 113 F.3d 270, 273 (1st Cir. 1997). Further, the burden of proving supervisory status is on the party alleging that such status exists. *Bozeman Deaconess Hospital*, 322 NLRB 1107, 1108 fn. 4 (1997).

As we recently stated in *Elmhurst Extended Care Facilities*, 329 NLRB 535 (1999), Section 2(11) does not include the authority to “evaluate” in its enumeration of supervisory functions. Thus, when an evaluation does not, by itself, affect the wages and/or job status of the employee being evaluated, the individual performing such an evaluation will not be found to be performing a statutory supervisory function.<sup>6</sup> As we explain below, we find that on this record, the Employer has not met its burden of establishing that the charge nurses perform a statutory supervisory function in evaluating employees.

### A. Probationary Evaluations

The Acting Regional Director concluded that the Employer’s charge nurses are supervisors, in part, because their “authority to perform probationary evaluations of newly hired CNAs constitutes the power to effectively recommend continued employment and a raise.” Contrary to the Acting Regional Director, we find that the role of the charge nurses in the Employer’s evaluation of CNAs after 30, 60, and 90 days of their hire does not establish that the charge nurses possess statutory supervisory authority.

Thus, although the charge nurses are asked to evaluate the new CNAs 3 times during the first 3 months of their employment, there is no evidence that this involves any more than the more experienced employee, *i.e.*, the charge nurse, assessing (or expressing an opinion as to) the aide’s knowledge of the requirements of the job; the quality and productivity of the aide’s work; the dependability or degree to which an aide can be relied upon to complete a job; the aide’s initiative in seeking out new assignments and in assuming new responsibilities; the aide’s independence in performing his or her work; and

<sup>5</sup> The form currently used is the same form that is used for probationary evaluations.

<sup>6</sup> See also, *Ten Broeck Commons*, 320 NLRB 806, 813 (1996); *Northcrest Nursing Home*, 313 NLRB 491, 498 at fns. 36 & 37 (1993).

the degree to which the aide follows the Employer's rules, including attendance. When a charge nurse numerically rates a probationary employee in these various categories, she is "doing so in a manner similar to that of the more experienced employee who conducts tests and grades the skills of new hires against recognized standards or guidelines." *Elmhurst Extended Care*, supra, at 536, fn. 8. As we stated in *Elmhurst*:

... we do not question whether the [charge nurses] exercise independent judgment in filling out the evaluations. We assume, *arguendo*, that the nurses use some professional or technical judgment based on their greater skills and expertise during the evaluation process. Whether the use of such judgment is supervisory independent judgment is, of course, a different question. But the essential question here is whether the nurses effectively recommend a reward or other personnel action concerning other employees. Since the answer to this question is that they do not, they are not statutory supervisors.<sup>7</sup>

In this case, as in *Elmhurst*, the essential question is whether the nurses effectively recommend a reward or other personnel action concerning other employees. Since the answer to this question is that they do not, they are not statutory supervisors. In fact, there is not even a space for recommendations on the evaluation forms, and there is no evidence that any probationary employee has been terminated or that any aide's probationary period has been extended as a result of the 30, 60, and 90-day evaluations. See *Harborside Healthcare*, 330 NLRB 1334 (2000).<sup>8</sup> Further, there is no indication that the (unspecified) wage increase all probationary employees receive at the end of this period is based on any numerical score given on those evaluations. Rather, it is automatically given on completion of probation. In these circumstances, we find the charge nurses' role in the completion of probationary evaluations indistinguishable from the role of the charge nurses in *Elmhurst*. Accordingly, as the nurses do not effectively recommend a reward or other personnel action concerning other employees, we conclude that the Acting Regional Director erred in relying, in part, on this aspect of the charge nurses'

role in the evaluation process to conclude that they are supervisors.<sup>9</sup>

## B. ANNUAL EVALUATIONS

Similarly, we find that the RN charge nurses' role in the Employer's annual evaluation process does not establish that they possess supervisory authority. The Acting Regional Director found that the RN charge nurses performed the annual performance appraisals jointly with the RN supervisors, and that the amount of each aide's merit increase is directly related to his or her score on the annual performance appraisal. Thus, he concluded that the RN charge nurses' role in these evaluations confers supervisory status. *Bayou Manor Health Center*, 311 NLRB 955 (1993).

We find, however, that the record fails to support the Acting Regional Director's conclusion. Thus, contrary to our dissenting colleague's assertions, the Employer has not met its burden of proving that its RN charge nurses have completed annual evaluations under the new system,<sup>10</sup> or that their participation in the evaluation process demonstrates the use of supervisory independent judgment. The three witnesses who testified regarding the Employer's new annual evaluation system stated that the RN nursing supervisors completed the evaluations before showing them to the charge nurses. Janet Cornell further stated that her charge nurses had to "justify" any suggested changes in the scores and/or comments if they disagreed with the ratings she already had given the employee. She did not elaborate on what she meant by "justify" or give any specific examples of cases where this had occurred or even how many nurses she was referring to in her generalization. On the other hand, the other two witnesses clearly testified that their participation in the evaluations was different from the description of the process given by Cornell, and that their role in this process was quite limited. Thus, as stated above, charge nurse Verville testified that she had not been told that she could suggest changes, and was only asked to sign or initial the form if she agreed with what the nursing supervisor had done. Charge nurse Meagher stated that, although she was called in to "discuss" the evaluations

<sup>7</sup> Id., 536 fn. 8 (citation omitted).

<sup>8</sup> As in the instant case, the Board found that charge nurses were not supervisors based on their role in evaluating nursing assistants where, *inter alia*, there was no evidence that charge nurses had recommended that the employment of any nursing assistant not be continued, or that any employee had been terminated based on a charge nurse's evaluation. 329 NLRB 535, 536.

<sup>9</sup> See also, *Provident Nursing Home*, supra; *Health Care & Retirement Corp. (Valley View Nursing Home)*, 310 NLRB 1002 (1993).

<sup>10</sup> Our dissenting colleague relies, in part, on the fact that charge nurses made "significant changes" in the RN supervisor's initial rating under the new evaluation system. However, the evaluations containing those changes were "recalled" and the nursing supervisors were told to redo them before they were given to the employees. Moreover, although Cornell testified that she asked her charge nurses to review the completed evaluations the second time around, of the two charge nurses who testified, one stated that she did not have any input into the final evaluations and the other stated that she merely was asked to initial the completed form if she and an LPN charge nurse agreed with it.

the first time the nursing supervisor completed them, she did not know that the first round of evaluations had been rejected by the director for nursing services, and she was never shown the evaluations when the supervisor filled them out on the second round.<sup>11</sup>

In these circumstances, we cannot agree with the Acting Regional Director that the evidence demonstrates that the charge nurses perform the annual appraisals jointly with the RN nursing supervisors. See *Harborside Healthcare*, supra. There, the employer's charge nurses as well as its unit managers (uncontested statutory supervisors) each prepared evaluations for the same nursing assistants. However, there was no indication as to how any conflict in the numerical ratings of the separate evaluations would be dealt with by the director of nursing. Further, unit managers in some instances had returned the charge nurses' evaluations to them for revision, and thus the director of nursing may not have even seen a charge nurse's independent evaluation of the assistant. The Board concluded that there was no evidence that the evaluations presented to the director of nursing were the product of the charge nurses' independent judgment, or that they reflected a collaborative effort between equals. Slip op. at 2.

In the instant case, even though the record contains several examples of merit evaluations signed solely by an RN charge nurse, only one of them is dated, but the three signed by an RN nursing supervisor clearly indicate when the evaluations were completed. As the testimony indicated, the director of nursing was dissatisfied with the first set of evaluations completed under the new system, and it is not possible to tell from the undated forms at what point in the process they were filled in or whether they were final evaluations. Although Cornell identified the signature on each of the forms as they were entered into the record, there was no other testimony regarding these evaluations. Thus, the Employer has failed to show that these evaluations are reliable evidence of supervisory status. Accordingly, we conclude that the charge nurses' participation in the annual evaluations of the CNAs fails to establish that the charge nurses possess supervisory authority as contemplated by Section 2(11) of the Act. See *Harborside Healthcare*, supra; *Provident Nursing Home*, supra. Cf., *Cape Cod Nursing & Retirement Home*, 329 NLRB 233 (1999); *Bayou Manor*, supra.

<sup>11</sup> Contrary to our dissenting colleague, we find that this inconsistency in the Employer's evaluation process indicates a failure of proof on the part of the Employer to establish that its RN charge nurses possess statutory authority.

## ORDER

The Acting Regional Director's exclusion of the RN charge nurses from the unit found appropriate for collective bargaining is reversed. The case is remanded to the Regional Director for further appropriate action consistent with this Decision.

MEMBER HURTGEN, dissenting.

I agree with the Acting Regional Director that the charge nurses are supervisors.

### 1. PROBATIONARY EVALUATIONS

The charge nurses evaluate CNAs three times during their probationary period (after 30, 60, and 90 days of employment). The charge nurse gives the CNA a numerical score for each of several categories of performance. The scores are given to the Director of Nursing Services. The Director then decides whether the CNA has successfully completed the probationary period. If so, the CNA is retained and is automatically given a wage increase. If not, the probationary period is extended and a wage increase is not given.

Based on the above, the Regional Director found that a charge nurse has the power "to effectively recommend continued employment and a raise." I would affirm the finding. My colleagues respond by saying that the charge nurse, when completing the evaluation, is simply giving her "opinion" as an "experienced" person. However, that would seem to be the essence of an evaluation, i.e. an experienced person gives an opinion about the performance of an employee. Surely, that does not mean that an evaluation has not occurred. Where, as here, that evaluation is relied upon by the Director of Nursing Services, and thus has employment consequences, the evaluation is clearly an act of supervision.

My colleagues respond that the evaluation is not an effective recommendation concerning personnel actions. I disagree. The Acting Regional Director found that the charge nurses, through the evaluations, have the power to effectively recommend "continued employment and a raise." As discussed above, that finding is amply supported by the evidence.<sup>1</sup>

I recognize that no probationary employee has been terminated, and none has had the probationary period extended. However, these facts are not determinative. The relevant fact is that recommendations to retain and to give an increase have been followed. And, the authority to recommend contra nonetheless exists.

Finally, the fact that the word "recommended" does not appear on the form cannot gainsay the reality of a

<sup>1</sup> To the extent that this case is similar to *Elmhurst Extended Care Facilities*, 329 NLRB 535 (1999), I agree with the dissenting opinion in that case.

recommendation. A numerical score is given and, unless changed by the Director (no evidence that it has been), the CNA will be retained and will be given a wage increase.

## 2. ANNUAL EVALUATIONS

The performance of the CNAs is rated under a numerical system. The score translates into a specific increase (90–100 = 50 cents; 90–95 = 40 cents, etc.). The RN supervisor makes the initial rating. The RN supervisor then gives the charge nurse the opportunity to make changes. Indeed, the system was recently changed to give the charge nurses an even greater opportunity to make changes. As a result, charge nurses made “significant changes” in the RN supervisor’s initial rating. Further, if there is a disagreement between the charge nurse and the RN supervisor, the charge nurse would prevail, so long as she could justify her score. Thus, the charge nurses’ role in the evaluation scores is at least as great, if

not greater, than that of the RN supervisor. And, since the evaluations determine the amount of wage increases, the charge nurse clearly exercises supervisory authority.

As noted above, the charge nurse reviews the evaluation prepared by admitted supervisors. And yet, my colleagues contend that the charge nurse is not a supervisor. In support of this oddity, my colleagues note that the charge nurse has to “justify” any changes made in the evaluation prepared by the supervisor. My colleagues complain that there is no elaboration of the word “justify.” In my view, this contention misses the essential point. The essential point is that the charge nurse can modify the evaluations prepared by admitted supervisors.<sup>2</sup>

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<sup>2</sup> In situations where the charge nurse changes the evaluation prepared by the supervisors, the change goes back to the supervisor for her to redo it, presumably in accord with the charge nurses’ change.